OEDCA DIGEST

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SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include "after-acquired evidence", job application requirements, OWCP rules, final *vs*. "proposed" actions, "direct threat" disability claims, volunteers *vs*. employees, and complaints about sexual harassment investigations. Also included in this issue is an article concerning the frequently raised claim of "preselection."

In response to user requests, the OEDCA Digest now contains a comprehensive, cumulative index.

The *OEDCA DIGEST* is available on the internet at: http://www.va.gov/orm/newsevents.htm.

CHARLES R. DELOBE

I

VA LIABLE FOR DISCRIMINATION DESPITE "AFTER-ACQUIRED EVIDENCE" CONCERNING APPLICANT'S QUALIFICATIONS

What happens when an employer refuses to hire an applicant because of discriminatory reasons, but later discovers evidence that would have provided a legitimate, nondiscriminatory reason for not hiring the individual based on a lack of eligibility? Is the employer "off the hook" because of this after-acquired evidence?

An applicant – hereinafter the "complainant" – applied but was not hired for a part-time position as an Internist at a VA medical center. He thereafter filed a complaint alleging that his failure to be hired was due to a disability (rheumatoid arthritis).

Later, during the course of proceedings in connection with that complaint, the medical center learned that the complainant was not a U.S. citizen. It argued, therefore, that the complainant lacked a basic requirement of eligibility for the job, *i.e.*, U.S. citizenship, and hence failed to establish even a *prima facie* case of disability discrimination.

The Equal Employment Opportunity Commission disagreed, finding that the complainant demonstrated by preponderant evidence that he was not hired because of his disability. In reaching this conclusion, the Commission expressly rejected the medical center's argument that it should not be liable for the discrimination because the complainant was never qualified to begin with. The Commission explained that because the medical center did not have this information at the time it made the decision not to hire the complainant, the information is considered "after-acquired" evidence. After-acquired evidence does not defeat an employer's liability for violating anti-discrimination laws. Instead, the after-acquired evidence may have some bearing on the type or amount of relief to which a complainant is entitled because of the violation.

In this case, the Commission found that the complainant, although not a U.S. citizen, could have been hired, as evidenced by the fact that the VA had previously hired him as a physician. The law requiring citizenship contains an exception that permits the VA to hire non-citizen physicians when it is unable to recruit a U.S. citizen to fill a position. In this case, the medical center had been unable to fill this position for over a year, and it offered no convincing evidence that it would not have waived the citizenship requirement. Accordingly, the complainant was entitled to the position, back pay, and other appropriate relief.

Let's assume slightly different facts; namely, that the medical center was having no difficulty recruiting physicians, that it had never waived the

citizenship requirement, and that several other highly qualified physicians, all of whom were U.S. citizens, had also applied for the Internist position. Given these facts, would the after-acquired evidence concerning the complainant's lack of citizenship now insulate the VA from liability?

Again the answer is no, because it discriminated on the basis of disability at the time it made its hiring decision -- a violation that cannot be excused. However, the VA would be able to limit the remedy available to the complainant under these facts, as it could convincingly prove that it would not have hired the complainant, even absent the discriminatory motivation, had it been aware that the complainant was not a citizen at the time of the hiring decision. In such a case, the complainant would not be entitled to the position, but back pay would be available from the date his application was rejected to the date the medical center discovered that he was not a U.S. citizen.

II

FAILURE TO SUBMIT COMPLETE APPLICATION RATHER THAN RACE DISCRIMINATION CAUSED APPLICANT'S REJECTION

Job applicants who fail to comply with the requirements set forth in the vacancy announcement will find it difficult to claim at a later date that their rejection was due to discrimination.

The employee in this case applied for a Computer Specialist position advertised in a vacancy announcement. The announcement warned applicants that they must submit a complete application package in order to be eligible for consideration. Part of the application package consisted of a document in which applicants had to address the KSAs for the position in question. In other words, the applicants had to describe in writing and with specificity how their qualifications and experience match the knowledge, skills, and abilities deemed important for success in the position for which they were applying.

The complainant applied but was found ineligible for further consideration, because she failed to submit her KSAs. She thereafter filed a complaint alleging, among other things, that her rejection was due to her race.

After reviewing the agency's investigative record and the complainant's response to the Department's interrogatories, an EEOC judge issued a decision without a hearing (*i.e.*, "summary judgment"), finding that it was the complainant's failure to comply with requirements of the application procedure, and not her race, that caused her rejection.

The complainant was given an opportunity during the interrogatory phase of the hearing stage to show that she complied with the KSA requirement. In her response to an interrogatory

regarding this requirement, she stated the following: "I would like it noted that I did turn in a complete application package." She did not specifically mention the KSA requirement in her answer; nor did she attach any evidence that would suggest that she had complied with this requirement (*e.g.*, a copy of the KSA document she submitted, a cover letter forwarding her application that indicated an attached KSA document, *etc*.)

Given the complainant's vague response, the EEOC judge concluded that the complainant had failed to establish a *prima facie* case of race discrimination. Specifically, he found no evidence in the record that the complainant had complied with this requirement, or that other applicants of a different race were referred for consideration, despite their failure to comply with this requirement.

For job applicants, this case illustrates the importance of complying with all requirements of the application procedure and submitting a complete application package.

In addition, it demonstrates that the burden of proof is always on the complainant to prove the elements of a *prima facie* case and, ultimately, to prove that discrimination occurred. Here while complainant claimed that she submitted a "complete" application package, she presented no evidence to prove it. Her mere assertion that she did so is not proof of that fact.

III

APPLICANT NOT HIRED BECAUSE OF OWCP RULES FAILS TO STATE A CLAIM OF DISABILITY DISCRIMINATION

In previous issues of the *OEDCA Digest* we have reported on claims which have been dismissed procedurally (*i.e.*, without investigation) because the claims were essentially attacking decisions made by the Department of Labor's Office of Workers' Compensation Program (OWCP). Usually, the OWCP decision denies a VA employee disability benefits for a job-related injury. Since VA has no jurisdiction (*i.e.*, no authority) over such matters, EEO complaints attacking OWCP decisions denying benefits are almost always dismissed for failure to state a claim. The following complaint was also dismissed for failure to state a claim, although it stems from an OWCP decision that granted disability benefits!

The complainant sustained an on-the-job injury while employed by the Department of the Navy. As a result of her injury, she separated from the Navy and, for 14½ years, had been collecting disability benefits from the OWCP. While still collecting such benefits she applied for a nursing position at a VA medical center. In January 2004 the medical center notified her that she would be hired.

During the pre-employment physical

required of all new hires, she mentioned that she was collecting OWCP payments for her disability, but claimed that she was now able to return to full employment. She presented a statement from her physician in support of that claim.

Because she was still collecting benefits and could not return to work without clearance from the OWCP, an HR specialist contacted the OWCP regarding her current status. The OWCP informed the specialist that they had no record of the complainant's physician recommending to OWCP that she be released back to full employment. Because the information on record at OWCP was inconsistent with what her physician had told the medical center, the medical center was obliged to withdraw the offer of employment because of her OWCP medical status.

The complainant alleged that the withdrawal of the employment offer by the VA constituted unlawful discrimination due to her disability. The VA dismissed her claim because it failed to state a claim.

An EEO complaint fails to state a claim against the VA if it involves a matter over which the VA has no jurisdiction. The VA had no jurisdiction in this matter, as the complainant was still collecting disability compensation payments from the Department of Labor, and she had failed to follow that agency's rules and regulations regarding return to Federal employment. Unless and until OWCP released the complainant back to full employment, the VA could not legally hire her.

IV

COMPLAINT ABOUT A PROPOSED ACTION DISMISSED

As the complainant in the following case learned, discrimination complaints regarding proposed actions are usually dismissed without being investigated.

The Equal Employment Opportunity Commission recently affirmed the VA's procedural dismissal of a complainant's disability discrimination claim because the claim was based on a proposed rather than a completed action. The complainant, a former staff nurse, had been collecting disability payments for approximately five years due to knee problems when she received a letter from the VA medical center where she had previously worked. The letter advised her that the Department of Labor (DOL) had provided the VAMC with a work capacity evaluation, which indicated that she was now capable of performing certain work assignments. The letter further advised her that the medical center had found and was offering her a psychiatric nursing job that met the restrictions outlined in the DOL work capacity evaluation. The letter advised her that the offer would remain open until the DOL's Office of Workers' Compensation Program (OWCP) had determined that

the job being offered was suitable. The complainant immediately objected to the VA's attempt to return her to work, claiming that the position was not appropriate because of her physical limitations and lack of expertise in psychiatric nursing. The OWCP disagreed, finding the position suitable to her physical limitations, and granting her 30 days to accept the job offer, or provide a justification for refusing it. The complainant provided a medical opinion from her physician, which indicated that the job offered to her was not suitable.

Upon receipt of that opinion, the OWCP informed her that, because of the apparent conflict in medical evidence, she would continue to receive her disability payments until OWCP obtained an impartial medical opinion to settle the conflict.

Rather than wait for OWCP's final determination regarding suitability, the complainant initiated an EEO complaint against the VA, claiming that the VA's job offer was discriminatorily motivated. After reviewing the complaint, the VA's Office of Resolution Management (ORM) dismissed[1] it, citing the EEOC's complaint processing regulations that require dismissal when the complaint merely concerns an agency's proposal to take an action. The complainant appealed the dismissal to the EEOC, but the Commission affirmed ORM's decision. It found that the complaint was about a proposed action, rather than a completed one; hence, dismissal was required under its regulations.

The rationale for EEOC's regulation requiring such dismissals is simple. Proposals to take an action or preliminary steps to an action do not, without further action by the employer, aggrieve the individual – *i.e.,* they do not cause sufficient harm or injury to give the employee standing to file a complaint. In addition, such a rule avoids dual complaint problems. A complaint about a proposal followed by a second complaint about the completed action results in needless duplication and a waste of resources.

Moreover, if ultimately no action is taken on the proposal -- which occasionally happens -- a complaint would not be necessary. Thus, in another recent VA case, a registered nurse received a notice of proposed reprimand for using insulting language to or about other persons. The nurse responded to the charges by denying them. Following further inquiry into the matter, management decided not to issue the reprimand. The complainant nevertheless filed an EEO complaint about the proposed reprimand. The complaint was dismissed because it concerned a proposed action, not a completed one.

There are, as always, exceptions to the rule, particularly where the complainant can show that some tangible harm or injury occurred because of the proposal. For example, a warning notice

[1] Because ORM dismissed the complaint on procedural grounds, it was not investigated.

of poor performance is generally a preliminary step to some subsequent action, such as an unsatisfactory performance evaluation. The notice, by itself, is not a sufficient harm or injury; hence, a complaint about such a notice could be dismissed. However, if the warning notice were accompanied by a reassignment to a new position, the employee has now been harmed and would be permitted to proceed with a complaint about the reassignment.

The Commission's regulation also provides that if the complaint alleges that the proposal or preliminary step was taken for the purpose of harassing the employee, the employee has already been harmed by the harassment, and the proposed action cannot be dismissed under this provision of the regulation.

V

TERMINATION UPHELD BECAUSE EMPLOYEE WITH HEART CONDITION POSED A "DIRECT THREAT"

The Equal Employment Opportunity Commission's regulations provide that agencies may defend allegations of disability discrimination by using the "direct threat" qualification standard when a qualified person with a disability poses a significant risk -- *i.e.,* a high probability -- of substantial harm to the health or safety of themselves or others that cannot be eliminated or reduced by reasonable accommodation.

The above regulations also provide guidance in determining whether an individual poses a direct threat to himself or others. EEOC Regulation 29 C.F.R. .1630.2 (r) states that a direct threat shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment should be based on a reasonable medical judgement that relies on the most current medical knowledge and/or on the best available objective evidence.

The Commission also provides factors to consider in determining whether an individual would pose a direct threat. The factors include: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm.

In a recent VA case, the complainant alleged that he was discriminated against on the basis of disability (heart problem) when he was removed due to his failure to provide a medical clearance that he was fit to work. While complainant was on a temporary appointment, he became ill and asked his supervisor to be placed in a sick leave status while he went to the hospital. The complainant was treated and admitted, but discharged himself and returned to work. His supervisor advised him that he had to provide a medical release to continue

working. When he returned to the hospital they readmitted him and requested that he have a medical procedure. The complainant decided against the procedure and again tried to return to work.

Thereafter, his supervisor notified him that his employment would be terminated because of his failure to provide medical documentation establishing that it was safe for him to return to work. At the time it issued the notice, management was not aware of the complainant's heart problem, and the complainant had not requested any accommodation.

Upon learning of his heart condition, the facility's medical staff conducted an individualized medical assessment, which found that the complainant was in imminent danger of having a severe coronary event.

The Commission agreed that the individualized assessment showed that returning the complainant to work posed a direct threat to the complainant's health -*i.e.,* the heart condition posed a significant risk of substantial harm. The Commission therefore concluded that the VA did not violate *The Rehabilitation Act* when it terminated his employment.

VI

CLAIM DISMISSED BECAUSE CLAIMANT WAS A VOLUNTEER, NOT AN EMPLOYEE

As a general rule, only employees and applicants for employment have standing to file discrimination complaints against their employer. Occasionally, however, volunteers (*e.g.*, a volunteer at a VA hospital) will file such complaints. The procedural issue posed by such complaints is whether the volunteer should be considered an "employee" under applicable civil rights laws. In some cases, depending on the circumstances, a volunteer may also be considered an "employee" under those laws. Consider the following case.

A few years ago, an individual [hereinafter "complainant"] was placed in a VA medical center by a community service organization that arranges unsubsidized work experience for Welfare-to-Work clients. The organization is responsible for placement and removal of participants to/from the worksite as well as scheduling their hours of duty. The organization placed the complainant in a volunteer status in the MCCR section of the medical center. A few months later, the community organization decided to remove her from the medical center placement. The volunteer challenged the removal by filing a complaint of employment discrimination. Her complaint, however, was against the VA medical center rather than against the community service organization that made the decision to remove her.

After reviewing the facts surrounding the placement, the VA dismissed the complaint for failure to state a claim,

concluding that the complainant was a volunteer and not an employee. In reaching its decision, the VA noted that the medical center did not "hire" the complainant, did not determine the number of hours the volunteer was to work, did not determine her tour of duty, and did not pay or remunerate her.

Furthermore, and of particular importance to its determination, the VA found that there was no evidence that such volunteer work at the VAMC led to subsequent employment. Volunteers were told specifically during orientation that there was no promise or guarantee that they would later be hired; that if they wanted to become VA employees after completing their volunteer work, they had to apply in the same manner as any other applicant; and that they would not receive preferential treatment because of their volunteer work.

Finally, and equally important, was the medical center's actual track record with respect to hiring. Not only was employment not promised, the VAMC had never hired any individuals who had been placed by the community organization. Hence, there was no evidence of an unwritten rule or implied understanding that volunteer work would later be rewarded with an offer of employment.

Given the above facts, the complainant was a volunteer, but not a VA employee. Thus, she did not have standing to file an employment discrimination complaint against the VA. Had the facts been different – *i.e.*, had there been evidence that volunteer work at that facility often led to subsequent employment, the outcome would have been different.

VII

EMPLOYER'S INVESTIGATION OF A SEXUAL HARASSMENT COMPLAINT IS NOT HARASSMENT

It is not uncommon for employees accused of sexual harassment to retaliate by filing harassment complaints of their own, wherein they allege that management's investigation of the sexual harassment claim constitutes discriminatory harassment against them. The following case illustrates the typical outcome of such complaints.

A Licensed Practical Nurse (LPN) alleged that he was discriminated against and harassed because of his race and gender when he was required to meet with a supervisor and provide a written response to a female surgeon's claim that he was sexually harassing her. He further claimed that his subsequent reassignment because of her allegations was also discriminatory, despite the fact that he had consented to it at the suggestion of his nurse manager.

An EEOC administrative judge issued a decision without a hearing finding no discrimination. OEDCA subse-

quently issued a final order accepting and implementing that decision, and the Commission later affirmed OEDCA's final order on appeal.

In its appellate decision, the Commission held, as did the EEOC judge, that the investigation of a sexual harassment claim is required by law, and clearly does not equate with the type of severe or pervasive misconduct associated with unlawful harassment. Moreover, the Commission held that the complainant's reassignment, to which he had consented, occurred as a result of the sexual harassment claim against him, and was a reasonable response to that claim. The complainant presented no evidence that his race or gender was a motivating factor in his reassignment.

VIII

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PRE-SELECTION AND PROMOTIONS: WHAT MANAGERS NEED TO KNOW

In response to email from readers about pre-selection in promotions, this week's tip discusses the rules and controversy surrounding managers who give preferences or advantages to certain employees. The pre-selection issue often crops up in promotion cases when employees are detailed or reassigned to certain highly sought-after positions that ultimately enhance their selection for promotions. In these situations, other employees in the office often view this as the manager granting an unfair personal preference to the employee, since they may not have been afforded the same opportunity for advancement. What managers need to know is that it is perfectly acceptable and legal for them to select candidates to fill temporary needs on a lateral basis, based on their knowledge of the employee's work record. The manager steps into a minefield, however, when the manager's actions show an intentional manipulation of the personnel system to give an advantage to a particular employee, not because of his or her work record, but for unlawful reasons, such as nepotism, personal friendship, political partisan affiliation or political party activity, union membership, sexual orientation, gender, religion, race, national origin, age or disability.

Even if managers already have a candidate in mind for a job opportunity, it still is wise (but not required) to encourage a level playing field for all candidates. For a detail or reassignment, this can be done by rotating all qualified employees into the detailed position so each can have an opportunity to perform the work. This is a good way to make sure that everyone has a shot at performing the work so managers can see each candidate's potential in the position. Managers could learn that the person they origi-

nally had in mind just might not be the best-suited candidate for the promotion after all, based on their performance on the detail. Also, giving a chance to serve in a detail adds variety to employees' work, builds confidence, and increases morale, motivation, and parity. Additionally, if the candidate you already have in mind is really best suited for the position, it will demonstrate this to other employees and will limit controversy.

For permanent promotions, managers should review their agency's merit promotion plan and consult with their human resources office to make sure that all of the rules for a fair selection are being followed. The vacancy announcement should not be tailored to intentionally exclude well-qualified applicants. It is also wise to convene a selection panel of peers and supervisors to make sure that all candidates are given a fair opportunity to compete for the vacancy, regardless of whether the manager initially has someone in particular in mind.

Where managers do get in trouble is when they single-out and reward employees whose work record shows that they are undeserving of a promotion. For example, there have been occasions where managers have used temporary appointment authority and restricted advertisement of a vacancy to hire a preferred applicant where the applicant would not have been otherwise eligible for appointment under a normal merit promotion announcement. There are other instances in which managers have specifically tailored a vacancy announcement to select a preferred applicant. Managers have even issued unjustified outstanding performance appraisals simply to enhance employees' prospects for a promotion. These practices, unsupported by a valid work reason, are a recipe for disaster.

Lastly, if managers do need to select someone for either a temporary or a permanent position, they should document the reasons for their decision. A rational, work-related reason, articulated and developed before any grievance or EEO complaint is filed, will greatly enhance the credibility and acceptability of a manager's decision.

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